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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SACRAMENTO PUBLIC LIBRARY AUTHORITY, Plaintiff and Respondent, v. HAGGINWOOD SERVICES, INC., et al., Defendants and Appellants.	C059879 (Super. Ct. No. 07AS04830)

Defendants Hagginwood Services, Inc., a California corporation, Janie M. Rankins, All City Maintenance, and James E. Mayle appeal from the denial of their motion to set aside their defaults and vacate the judgments entered against them in favor of plaintiff Sacramento Public Library Authority, a joint powers authority.

Defendants contend the trial court had no discretion to deny their motion for relief pursuant to Code of Civil Procedure, section 473, subdivision (b) because their attorney's affidavit of fault rendered the relief "mandatory."[1] We disagree: the mere filing of an attorney's affidavit of fault

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[1] All further statutory references are to the Code of Civil Procedure.

does not automatically entitle a litigant to relief if, as here, the court rejects the affidavit as lacking credibility and thereby "finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b); see *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 (*Milton*).)

Here, the trial court was entitled to reject the showing made by defendants' moving papers and, having done so, was entitled to deny their motion. We shall affirm.

BACKGROUND

Underlying Facts

This action arises from defendants' alleged fraudulent conduct in connection with providing maintenance services to the Sacramento Public Library Authority (the "Library"). Defendants Rankins and Mayle were alleged to have routinely overbilled the Library for maintenance work through the use of a business they owned or controlled, defendant Hagginwood Services, Inc. Rankins and her sole proprietorship, defendant All City Maintenance, were also alleged to have performed services for which a contractor's license was required, although neither was so licensed. Based on those allegations, the Library brought this action in October 2007 to recover more than $1.3 million from defendants.

Proofs of service in the record show defendants were served with the summons and complaint in November 2007. They filed no responsive pleading.

Instead, defendants' counsel, Leo Donahue, contacted the Library's attorney, Diane Balter, to discuss defendants' tender of the defense to their insurer, and whether the Library would forbear from taking their defaults in the interim.

On February 28, 2008 (all further dates refer to events in 2008 unless otherwise indicated), the Library requested that the defendants' defaults be entered; the court granted the request and entered their defaults the same day.

On May 13 the court entered judgment in the Library's favor against all defendants, and issued a writ of execution.

First Relief Motion and Attorney Donahue's Declaration No. 1

A month after judgment was entered, defendants moved ex parte to set aside the defaults, vacate the judgment, and quash the writ of execution (§ 473, subd. (b)) on the ground defendants' attorney, Donahue, was led to believe by Balter that "they were engaged in settlement negotiations and that defendant[s'] default would not be taken" and had thereby mistakenly refrained from filing a responsive pleading on defendants' behalf.

In support of the application, Attorney Donahue submitted a declaration stating, in relevant part:

"4. There was a series of communication[s] between myself and Diane B. Balter, the attorney for the Sacramento Public Library wherein we discussed delaying the filing of the case to see if there was going to be any insurance coverage.

"[¶] . . . [¶]

"7. I understood from my discussions with Ms. Balter that the intent of our discussions was to avoid the waste of time and effort that would result if a default was filed in the case.

"8. I was notified on January 3, 2008, that the Sacramento Public Library would be forced to file a default in the matter shortly thereafter if there was not any response from the insurance company. However, I was informed by Ms. Balter that she had to send this letter out because she was being pressured but that no action would be taken. We agreed that a default would only delay the matter and in fact, cost the parties time and expense to set it aside.

"9. Because I was told that my clients were under no threat of default, I had--with Ms. Rankin-Mayle's consent--allowed direct communication between the coverage counsel of the insurance company and Ms. Balter. I even provided Ms. Balter with the contact information to facilitate the communications.

"10. Ms. Balter never informed my office of any of the communications she had with coverage counsel; and I attempted to make contact with coverage counsel to determine the status of coverage, to no avail.

"[¶] . . . [¶]

"12. Thereafter and on or about February 20, 2008, I contacted Ms. Balter and we discussed the situation. The main points of the conversation were that 1) Janie M. Rankins-Mayle and James E. Mayle would attempt to locate counsel to tender a defense; 2) we discussed the potential of settling the case with

a compromise amount; and 3) no default was in the process of being taken.

"13. After my discussion we [*sic*] Ms. Balter regarding the potential for settlement and the defense of the action by another attorney, I received no correspondence or communications regarding the taking of a default by Ms. Balter.

"14. Based on my communications with the opposing counsel in January and February, 2008, it was my understanding and I incorrectly assumed that opposing counsel would not file a default in the matter because we had both expressed our desire to proceed with the case without the expense, time and effort of having to set aside any default taken. Although I had received written communications expressing an urgency to move the case forward, telephonic communications still led me to incorrectly believe that the Library would not file any default in the matter. I was mistaken in that the Sacramento Library filed a default in the matter in February 2008."

The ex parte application was apparently denied, because defendants filed a new, noticed motion to set aside the defaults, vacate the judgment, and quash the writ of execution.

Second Relief Motion and Attorney Donahue's Declaration No. 2

Defendants' noticed motion sought relief on the same basis as their ex parte application: that their attorney mistakenly refrained from filing a responsive pleading because he was led by the Library's counsel to believe defendants' default would not be taken while they waited to hear if their defense would be covered by insurance.

This time, however, Attorney Donahue's supporting declaration was a page shorter, had unnumbered paragraphs, and presented a truncated version of the facts to which he had sworn in his first declaration. Specifically, his second declaration made no reference to the February 20 conversation with Attorney Balter that featured so prominently in his first declaration. Rather, he averred only that, during 2007, "[t]here was a series of communication[s] between myself and Diane B. Balter, the attorney for the Sacramento Public Library wherein we discussed delaying the filing of the case to see if there was going to be any insurance coverage. [¶] . . . [¶] . . . I understood from my discussions with Ms. Balter that the intent of our discussions was to avoid the waste of time and effort that would result if a default was filed in the case.

"I was notified on January 3, 2008, that the Sacramento Public Library would be forced to file a default in the matter shortly thereafter if there was not any response from the insurance company. I had, with Mr. [*sic*] Rankin-Mayle's consent allowed direct communication between the coverage counsel of the insurance company and Ms. Balter.

"During the ensuing month of January, I attempted to make contact with coverage counsel to determine the status of coverage; to no avail. Based on my communications with the opposing counsel in January and February, 2008, I incorrectly assumed that opposing counsel would not file a default in the matter because we had both expressed our desire to proceed with the case without the expense, time and effort of having to set

aside any default taken. Although I had received written communications expressing an urgency to move the case forward, telephonic communications still led me to incorrectly believe that the Library would not file any default in the matter. I was mistaken in that the Sacramento Public Library filed a default in the matter in February, 2008."

Attorney Balter's declaration accompanying the Library's opposition to defendants' motion to set aside the default and vacate the judgment expressly denied ever having intimated to Donahue that his clients were under no threat of default, or that there was no need to respond to the complaint. On January 3, Balter wrote to Donahue that defendants' time to answer had expired and told Donahue to "make it very clear to the insurer that unless we have a definitive response within the next few days, I will be notifying you that your clients have fifteen (15) days to respond to the complaint. Failing a response within that time, we are prepared to enter your clients' default." Balter wrote again on February 15, telling Donahue she would promptly enter defendants' default if they failed to respond to the complaint by February 27.

Balter also expressly challenged Donahue's veracity. Of his first declaration, she averred that several items were "a complete fabrication:

"• Mr. Donahue did not contact me on or about February 20, 2008, to discuss the situation. No such conversation ever took place. . . .

"[¶] . . . [¶]

"• Mr. Donahue never told me that Rankins-Mayle and Mayle would attempt to locate counsel to tender a defense.

"• Mr. Donahue and I never discussed the potential of settling the case with a compromise amount.

"• I never told Mr. Donahue that 'no default was in the process of being taken'."

After noting the "significant deletions and no additions" made to Donahue's first declaration in order to create his second declaration, Balter noted that the second Donahue declaration is "bereft of any specifics that could have left Donahue with the mistaken impression that the [Library] would hold off on requesting entry of default."

The trial court denied defendants' motion to set aside the defaults and vacate the judgment. In so doing, it noted that Donahue's declaration "is not credible in view of the correspondence faxed and mailed to him on February 14, 2008 stating that the plaintiff would enter the default against defendants if they did not file a responsive pleading by February 27, 2008. Further, plaintiff's counsel denies that purported conversation of February 20, 2008, and previous correspondence by plaintiff's counsel made clear that the extension of time to file a responsive pleading plaintiff had granted was not open-ended."

DISCUSSION

Defendants Failed to Meet Their Burden to Produce Evidence to Show that Relief was Warranted

Section 473, subdivision (b) contains discretionary and "mandatory" provisions. The discretionary provision permits the trial court to grant relief "as may be just" based upon the party's "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).)

The mandatory, or "attorney fault," provision of section 473, subdivision (b) states, in part: "(W)henever an application for relief is [timely], is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, [the court shall] vacate any (1) resulting default . . . or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." If the requirements of the statute are met, courts have held that relief is mandatory. (E.g., *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 989.)

Defendants, as the moving party, bore the burden of proving relief was warranted. (*Luz v. Lopes* (1960) 55 Cal.2d 54, 62; *Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1017.)

On appeal, defendants insist the fact their motion for relief was accompanied by an attorney's affidavit of fault compelled the trial court to grant it. They are mistaken.

The mere filing of an attorney affidavit of fault does not automatically entitle a litigant to relief under the mandatory relief provision of section 473, subdivision (b). As noted above, that subdivision states that relief will be denied where "the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) This provision gives the court the authority and responsibility to test both the credibility of the declarations and the causation of the default. (*Milton*, *supra*, 53 Cal.App.4th at p. 867; see also *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623 [trial court determines credibility and evaluates affidavits on section 473, subdivision (b)].) Trial courts may disbelieve declarations, even if no contradictory evidence is introduced. (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 149; *Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1017, fn. 7; *Smith v. Smith* (1958) 157 Cal.App.2d 658, 662.)

Here, the trial court plainly disbelieved the showing made in defendants' moving papers. It expressly found "not credible" Donahue's statements that he was led by Balter to believe the Library did not intend to seek his clients' default, particularly in view of Balter's written two-week warning that she would do so if they failed to respond to the complaint by February 27.

Although it is settled that a reviewing court will not reweigh the evidence or pass upon the credibility of witnesses

(*Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 368), we note that the trial court's decision to reject Donahue's evidence is amply supported by the record. Donahue's detailed description in his first declaration of a February 20 conversation that Balter denies ever occurred; his filing of a second, truncated declaration in support of the instant motion; and his insistence in the face of written correspondence to the contrary that he was led by Balter to believe there was no need for his clients to file a responsive pleading all justified the court's decision to disbelieve him.

Because the trial court was entitled to disbelieve defendants' showing that the default was created by Donahue's mistake in relying on Balter's promise she would not take his clients' default, there is no merit to defendants' contention that Donahue's affidavit of fault required a grant of relief.

DISPOSITION

The order denying defendants' motion to set aside the default and vacate the judgment is affirmed. The Library shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(2).)

RAYE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.